No. 89-1680

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TRUSTEES OF BOSTON UNIVERSITY,
Petitioner,

v.

JULIA PREWITT BROWN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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May 29, 1990

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The American Association of University Professors files this brief *amicus curiae* in opposition to the Petition for a Writ of Certiorari with the consent of the parties. Letters of consent are on file with the Clerk. This brief addresses only the first question presented for review, concerning the judicial award of tenure as a remedy for discrimination.

INTEREST OF THE AMICUS

The American Association of University Professors (hereinafter "AAUP" or the "Association") is a na-

tional membership organization of more than 40,000 college and university faculty members and research scholars in all academic disciplines. Founded in 1915, it is the nation's oldest and largest body dedicated to the advancement of higher education from the perspective of the faculty. The Association, which participates in litigation on a very selective basis, filed a brief *amicus curiae* in support of Professor Brown in the court of appeals, as did the Equal Employment Opportunity Commission.

AAUP, frequently in collaboration with other higher education organizations, formulates national standards for the academic community. AAUP policy statements address many facets of academic life, including the protection of academic freedom and tenure, procedural standards for the renewal of faculty appointments, the faculty role in institutional governance, and the elimination of discrimination in higher education.[1] State and federal courts throughout the country, including this Court, have referred to AAUP policy statements in resolving disputes involving faculty members, their institutions, and their

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[1] The major AAUP policy statements are compiled in *AAUP Policy Documents & Reports* (1984), a copy of which is in the Supreme Court library. The AAUP statements referred to herein may be found in this volume. The 1940 *Statement of Principles on Academic Freedom and Tenure*, prepared jointly by AAUP and the Association of American Colleges, is the "most widely-accepted academic definition of tenure." *Krotkoff v. Goucher College*, 585 F.2d 675, 679 (4th Cir. 1978). Over 130 educational organizations and learned societies have endorsed the 1940 *Statement*. The Association's derivative *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* (adopted initially in 1971; revised in 1989) sets forth procedures to safeguard against decisions adversely affecting a faculty member that would be violative of academic freedom, impermissibly discriminatory, or based on inadequate consideration. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1971).

students.[2] Among these policy statements is the 1976 *Statement on Discrimination* which condemns discrimination on the basis of sex, race, and other factors not directly relevant to professional performance, and which reflects the Association's commitment to eliminating such discrimination in colleges and universities. *AAUP Policy Documents & Reports* 73 (1984).

A fundamental premise accepted within the academic community is that colleagues and fellow specialists are best able to assess the scholarly contributions and potential of individual faculty members. The 1966 *Joint Statement on Government of Colleges and Universities*, formulated by AAUP, the American Council on Education, and the Association of Governing Board of Universities and Colleges, states that the faculty has the primary role in making decisions about the status of faculty appointments. *AAUP Policy Documents & Reports* 105, 109 (1984). This joint statement, formulated by faculty, administration and trustee representatives, places in the hands of the faculty the basic responsibility for judging the qualifications of tenure candidates.

The AAUP's interests in this case extend to protecting the role of the faculty in tenure decisions and to ensuring that illegal or improper considerations do not taint tenure deliberations. The decision of the United States Court of Appeals for the First Circuit respects these interests, does not conflict with any other circuit decision, and, under the facts presented, properly reconciles the principles of non-discrimination and academic freedom.

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[2] *E.g., Delaware State College v. Ricks*, 449 U.S. 250, 264 n.3 (1980) (Stewart, J., dissenting); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Gray v. Board of Higher Education*, 692 F.2d 901, 907 (2d Cir. 1982).

REASONS FOR DENYING THE PETITION

Introduction And Summary of Argument

This case presents no issues worthy of a writ of certiorari. No conflict among the circuit courts of appeals is created by the decision in this case. The award of tenure, affirmed below, was the only relief that could make Professor Brown whole, insofar as the denial of her tenure and the university's offer of an extended probationary appointment were found to be discriminatory. Furthermore, the award of tenure in this case properly gives force and effect to the nearly unanimous, and truly academic, judgments of the faculty and expert panels that recommended tenure.

Contrary to the assertions of Petitioner Boston University, no conflict exists among the circuit courts of appeals. In fact, the decision below acknowledges, as does the decision with which Petitioner contends it conflicts, the unique nature and purposes of tenure. Both decisions recognize that, in appropriate factual circumstances, a judicial award of tenure may be proper.

Since Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e-5(g), authorizes remedies including reinstatement and promotion, reinstatement for a faculty member discriminatorily denied tenure may properly be accompanied by tenure itself. On the facts proved below, equitable relief including reinstatement with tenure is the only remedy that could make the plaintiff whole. Questions concerning whether judicially awarded tenure is necessary to afford complete relief to a victim of discrimination are fact-dependent and fail to present any legal issue of overriding importance to justify this Court's intervention. The fashioning of appropriate remedies under Title VII is ordinarily left to the sound discretion of the trial court, and no abuse of that discretion occurred here.

To the extent that the Petition suggests that a judicial award of tenure may never be made regardless of the

facts proven at trial, Petitioner cannot claim direct support from any authority. Petitioner's argument, furthermore, asserts that a right rooted in the First Amendment insulates universities from make-whole relief for illegal discrimination on the basis of a faculty member's sex. Such an affirmative right to discriminate has been rejected by this Court. There is simply no constitutional right to discriminate on the basis of sex. To hold otherwise eviscerates the standards established by this Court in *Regents of University of Michigan v. Ewing*, 474 U,S. 214 (1985), for determining when judicial deference to academic judgment is required and when claims of academic freedom are, as in this case, abused by the party asserting such an interest.

I. The Decision Below Does Not Conflict with *Gutzwiller v. Fenik.*

The Petition contends that the decision below conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988). The university alleges that the decision below requires an automatic award of tenure in each case where a plaintiff has not received tenure, while the Sixth Circuit limits awards of tenure to those cases in which no dispute exists as to the plaintiff's academic qualifications. Petition at 16-17. No conflict exists among the circuits on the propriety of judicial awards of tenure in appropriate fact-dependent cases. Each court considering whether tenure may be judicially awarded has observed that it is an available remedy where the factual circumstances require such an award to make the victim of discrimination whole.[3] Petitioner's effort to create a con-

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[3] In addition to the First Circuit in this case, the Third and Sixth Circuits have recognized the availability, and actually affirmed remedial awards, of tenure in appropriate factual circumstances. *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), 741 F.2d 858 (6th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985) (award of tenure to husband affirmed where, absent retaliatory nonreappointment, he

flict among the circuits falls wide of the mark, as the decision below can readily be reconciled with *Gutzwiller*.[4]

It is axiomatic that when a faculty member prevails on a claim that she has been denied tenure because of her sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e *et seq.*, she is entitled to relief that will make her whole. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Professor Brown's colleagues in the English Department were unanimously supportive of her candidacy, as was the College of Liberal Arts faculty review committee. A third faculty review committee and an outside panel of experts were nearly unanimous as well. The Dean's recommendation in favor of tenure was rejected by the Provost and President. The court below adequately reviewed the record, determined that the evidence supported the jury's conclusion that but for discriminatory animus Professor Brown would have received tenure. Since, ab-

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would have attained tenure by operation of state law; award to wife reversed where, absent nonreappointment, she would have attained only eligibility to be evaluated for tenure); *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988) (remanding case to district court to determine whether facts required a judicial award of tenure); *Kunda v. Muhlenberg College*, 621 F.2d 532 (3rd Cir. 1980) (affirming award of conditional tenure where college discriminatorily failed to advise a faculty member of a degree requirement for attaining tenure). *See also, Pyo v. Stockton State College*, 603 F.Supp. 1278, 1284 (D.N.J. 1985) (discussing possible remedies under a variety of factual circumstances, "court cannot rule out an award of tenure").

[4] Petitioner erroneously contends that the factual circumstances of *Gutzwiller* are identical to the factual circumstances of this case. Professor Gutzwiller received but one vote in favor of tenure and that one from a Dean, not a fellow faculty member. 860 F.2d at 1322-24. Professor Brown, in contrast, received nearly unanimous support from faculty and outside expert review panels. Among those panels, over 40 votes were cast, only 3 were negative. *See* Pet. app. 3a-9a.

sent discrimination, Professor Brown's candidacy for tenure would have been successful, she cannot be made whole without an award of tenure. A tenured position, rather than yet another opportunity to be evaluated for tenure or an extended probationary appointment, is the remedy that satisfies the remedial purposes of Title VII.[5] It was tenure itself that was discriminatorily denied.

In *Gutzwiller*, the discrimination infecting the tenure review occurred at the very beginning of the process. Professor Gutzwiller never received an unbiased evaluation, due to the invasion at the first level of the review process by the sexual bias of the two most influential faculty members.[6] Unlike Professor Brown, Professor

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[5] Boston University's suggestion that Professor Brown would have been made whole if she had accepted the proposed extended probationary period subverts the standards for tenure proceedings established by AAUP and widely endorsed in the academic community. The 1940 *Statement of Principles on Academic Freedom and Tenure, AAUP Policy Documents & Reports* 3 (1984), establishes that the probationary appointment should not exceed seven years. Extending the probationary appointment is not generally recognized as an acceptable alternative to a decision either to grant tenure or not to retain the probationer, and it does nothing to remedy a wrongful denial of tenure. Moreover, in this case, the offer of extended probation as an alternative to tenure was itself discriminatory. Pet. app. 49a.

The purpose of make-whole relief was explained in Congress during consideration in 1972 of the amendments to Title VII as requiring "that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972). Former EEOC Commissioner Fred W. Alvarez has observed that nondiscriminatory placement in the position the person would have held absent discrimination, if possible, is essential to enforcement of Title VII. Alvarez, F., "Remedies for Unlawful Employment Discrimination," 3 *The Labor Lawyer* (ABA) 199 (1987).

[6] With the exception of Professors Fenik and Cohen, all faculty reviewers were found not to have discriminated against Professor Gutzwiller. Professors Fenik and Cohen unduly influenced the other faculty reviewers. 860 F.2d at 1327.

Gutzwiller received no evaluation of her tenure-worthiness free of discriminatory taint, and thus her qualifications for tenure were never properly reviewed. For this reason Professor Gutzwiller's tenure-worthiness may be considered unknown or disputable, and a remedy that allows her to receive an unbiased review may well make her whole.[7] In its remand of *Gutzwiller*, the court of appeals did not rule out tenure as an appropriate remedy, and directed the trial court to consider equitable relief. The court of appeals indicated that tenure, front pay, or reconsideration for tenure could be appropriate. 860 F.2d at 1333. Here, unlike the *Gutzwiller* circumstances, there is no true dispute over Professor Brown's tenure qualifications. Petitioner's efforts to create a dispute as to Profesor Brown's academic qualifications ignore the nearly unanimous recommendations Professor Brown received from the faculty and expert panels.

Both the Sixth Circuit in *Gutzwiller* and the First Circuit here recognized the unique nature of tenure, their responsibilities to avoid making tenure judgments *ab initio*, and the fact-dependent nature of the judicial award of tenure.[8] In a very real sense, the discrimination in *Gutzwiller* deprived the plaintiff of unbiased consideration for tenure at any stage in the process. In this case, the discrimination did not deny Professor Brown the opportunity for unbiased faculty and expert evaluations, but deprived her of tenure itself.[9] Carrying its

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[7] Since the evaluation by faculty colleagues is indispensable and primary (*see* 1966 *Joint Statement on Government of Colleges and Universities, AAUP Policy Documents & Reports* 105, 109 (1984)), Professor Gutzwiller's qualifications for tenure could not be accurately reviewed until an unbiased faculty evaluation was conducted.

[8] *See Gutzwiller v. Fenik*, 860 F.2d at 1333; Pet. app. 47a-50a.

[9] *See Pyo v. Stockton State College*, 603 F.Supp. 1278, 1284 n.5 (D.N.J. 1985) ("the relief may depend on the level of the tenure process at which the discriminatory decision or recommendation was made. The earlier in the process the discrimination occurred, the more speculative a determination would seem to be that

manufactured dispute of Professor Brown's qualifications further, Boston University implies that Professor Brown would be a marginal member of the university community, overlooking the facts that her tenure-track contract was regularly renewed after she commenced teaching in 1974, that her colleagues in the English Department and the College of Liberal Arts were unanimously supportive of her tenure candidacy, and that the administration offered to promote her to Associate Professor and to extend her probationary appointment for an additional three years.

Boston University suggests judicial awards of tenure should be reserved for those cases in which there is absolutely no dispute over the candidate's qualifications. Petition at 14. A university which denies tenure to a faculty member could always point to some aspect, however trivial, of that negative decision as having created a dispute over the candidate's qualifications. Petitioner's proposal thus amounts to virtually no standard at all. The EEOC's arguments supporting Professor Brown in the court below suggest that the university's proposal would undermine the remedial provisions of Title VII. The EEOC, as an *amicus* below, observed:

> In the absence of compelling reasons to grant Brown less than make whole relief, denial of tenure would violate Congress' mandate and the Supreme Court's directive in *Albemarle*, 422 U.S. at 418.

Brief for the United States Equal Employment Opportunity Commission as *Amicus Curiae* at 8, filed in *Brown*

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later decision makers, but for discrimination, would have acted differently."). *See also, Ford v. Nicks*, 866 F.2d 865 (tenure remedy reversed where faculty member was never evaluated for tenure); *Briseno v. Central Community College Area*, 739 F.2d 344 (8th Cir. 1984) (tenure remedy inappropriate where, but for discrimination, plaintiff would have been hired into a probationary position); *Gurmankin v. Constanzo*, 556 F.2d 184 (3rd Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (affirming district court refusal to order tenure where plaintiff had never been evaluated for tenure).

v. Trustees of Boston University, No. 88-1288 (1st Cir.). Untested in the lower courts and disfavored by the EEOC, Petitioner's suggested standardless rule of deference is unworthy of this Court's attention.

Assuming, solely for the sake of argument, that a general rule should prohibit judicial awards of tenure unless no legitimate academic dispute exists as to a candidate's qualifications, the record in this case satisfies such a standard. Every faculty and expert panel evaluating Professor Brown's candidacy recommended tenure. The policy standards of the AAUP, joined by representatives of college and university administrators and trustees, establish such peer and expert evaluations as primary in tenure review proceedings. A final decision departing from the faculty and expert recommendations is appropriate only in "rare" and "exceptional" cases when justified by "compelling" reasons. 1966 *Joint Statement on Government of Colleges and Universities, AAUP Policy Documents & Reports* 105, 109 (1984). In light of Professor Brown's support among the faculty and expert panels and the jury's determination that her sex was the reason for the tenure denial, no legitimate dispute raising "compelling" reasons to deny tenure is presented in this case.

II. First Amendment Academic Freedom Interests Do Not Insulate Universities From Make-Whole Remedial Orders For Violations of Anti-Discrimination Statutes.

This Court has observed that "[t]here is no constitutional right to discriminate in the selection of who may attend a private school or join a labor union," become an employee, receive tenure in a university, or become a partner in a law firm. *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984). Vigilant protection of First Amendment academic freedom interests is essential to the well-being of universities and faculty, but the existence of those interests does not establish a safe harbor for illegal discrimination. In *Hishon*, this Court further observed:

"[A]s we have held in another context, '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.' *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)." *Id.*[10]

This Court has long recognized that academic freedom, including the freedom to "determine . . . on academic grounds who may teach," is entitled to protection under the First Amendment. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). *Accord, Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.); *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967). From this fundamental and indisputable principle the University draws a more questionable implication, that its intentionally discriminatory decisions also constitute exercises of academic freedom and are shielded from meaningful judicial remedy.

In *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), this Court observed that "genuinely academic decisions" are entitled to judicial deference unless the determination is

> such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Under the *Ewing* standards, decisions "determin[ing] . . . who may teach" are entitled to First Amendment protection and judicial deference on principles of academic

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[10] *Powell v. Syracuse University*, 580 F.2d 1150, 1153-54 (2d Cir. 1978) (court explained that its precedent does not mandate "minimal scrutiny of college and university employment practices," but respect for "relative institutional competences," and noted that its precedent, *Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974), "does not and was never intended to, indicate that academic freedom embraces the freedom to discriminate.")

freedom to the extent that the decisions are "genuinely academic decisions," "on academic grounds," and reflect "professional judgments" adhering to "accepted academic norms."

In this case, Boston University had the opportunity to rest its decision on professional grounds and to adhere to academic norms. Instead, the university allowed illegal considerations to intrude, in determinative part, on the tenure process, resulting in the discriminatory denial of tenure. Intentionally discriminatory determinations of "who may teach" are not "genuinely academic decisions," as they fail to adhere to "accepted academic norms." [11] Nor do they constitute decisions "on academic grounds." [12]

This Court recently clarified that academic freedom requires the protection of "*legitimate* academic decisionmaking." *University of Pennsylvania v. EEOC*, —— U.S. ——, 110 S.Ct. 577, 587 (1990) (emphasis in original). Congress extended Title VII's coverage to colleges and universities, in part in order to remedy the "lack of access for women and minorities to higher ranking (*i.e.*, tenured) academic positions. See H.R. Rep. No. 92-238, pp. 19-20 (1971), U.S. Code Cong. & Admin. News 1972, pp. 2137, 2154-2155." *Id.* at 582. Clearly, Congress did not view discriminatory denials of tenure to be "legitimate academic decisionmaking" and contemplated that extension of Title VII to educational institutions would provide a meaningful remedy for a discriminatory denial of tenure.

Academic freedom cannot be contorted to insulate universities from judicial awards of tenure in appropriate

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[11] *See Gutzwiller v. Fenik*, 860 F.2d at 1329. *See also* 1976 *Statement on Discrimination, AAUP Policy Documents & Reports* 73 (1984).

[12] The court of appeals suggested, as the amicus EEOC argued, that a decision based on discriminatory animus is not a decision "on academic grounds." Pet. app. 48a.

cases without eviscerating Title VII and abandoning all standards for determining whether a university's decision is entitled to judicial deference. The Petitioner's arguments seek to erect academic freedom and the First Amendment as nearly impenetrable barriers, creating a constitutional sanctuary for intentionally discriminatory decisions made in the academic community. This Court has consistently rejected efforts to create a constitutional right to discriminate on illegal bases and should refuse to hear another case that, in effect, urges the same proposition.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari. There is no conflict among the circuits, and the decision below correctly reconciles First Amendment interests and interests in the enforcement of civil rights.

Respectfully submitted,

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